

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NASSAU : PART 33  
-----X

3 THE PEOPLE OF THE STATE OF NEW YORK,

4 -against- Indictment No.  
5 167N-2005

6 MARK ORLANDO and HERVE JEANNOT,

7 Defendants.  
-----X

8 Mineola, New York  
9 April 21, 2005

10 B E F O R E: HONORABLE ALAN L. HONOROF  
11 Acting Supreme Court Justice

12 A P P E A R A N C E S: (SAME AS PREVIOUSLY NOTED)

13 \* \* \*

14 THE CLERK: Indictment 167N-04, the People  
15 against Mark Orlando and Herve Jeannot. This hearing  
16 is continued. People ready?

17 MR. HAYDEN: Ready, your Honor.

18 MR. LEMKE: Defendant for Mr. Orlando ready,  
19 your Honor.

20 MR. HOCHHEISER: For Mr. Jeannot, ready,  
21 Judge.

22 THE CLERK: Both sides are ready, Judge.

23 THE COURT: I've reviewed the cases that all  
24 sides have submitted. Is there anything anybody else  
25 wants to tell me or discuss with me before I make my

1 decision?

2 MR. HAYDEN: No, your Honor.

3 MR. LEMKE: Nothing further on behalf of Mr.  
4 Orlando, your Honor.

5 MR. HOCHHEISER: I would like to continue  
6 with a couple of points if I may, Judge.

7 THE COURT: Please.

8 MR. HOCHHEISER: As to the issue of whether  
9 my client's statements to the police, particularly the  
10 statements witnessed by Detective Partee and Detective  
11 McHugh and reduced to writing by Detective McHugh, were  
12 voluntary. As your Honor is aware, there is case law  
13 which is very clear that you view evidence based on the  
14 totality of the circumstances to determine whether the  
15 People have met their burden of proving beyond a  
16 reasonable doubt that the statement was voluntarily  
17 made.

18 People versus Sunset Bay, a First Department  
19 1980 case at 76 AD2d 592 is a case where the court did  
20 suppress statements and reversed a murder conviction  
21 because of psychological pressures by the police. In  
22 this case, if my memory of the case serves me  
23 correctly, involved similar tactics to those in our  
24 case, that is, the Sunset Bay case involved a high  
25 level of emotional intensity. The interrogating

7 I bring this to the Court's attention because  
8 it's like the testimony in our case where Detective  
9 Partee says, "Listen, you can't let this fat white  
10 motherfucking piece of shit put this all on you. You  
11 got to take some of the weight. Come on, man." It's  
12 the same kind of situation and I'd ask you to follow  
13 the well-reasoned decision of the First Department in  
14 the Sunset Bay case.

15 And also I would along the same lines direct  
16 the Court's attention to People versus Zimmer, which is  
17 at 68 Misc2d 1067, a Wayne County 1972 case, and that  
18 case I think is particularly poignant because in that  
19 case they used a lie detector which the police  
20 persuaded the suspect that they knew that she was lying  
21 because of the lie detector machine, which is analogous  
22 here because here we have the so-called central storage  
23 videotape, another machine, which the detectives,  
24 including Detective Partee who really didn't see  
25 anything on the tape, convinces my client the

1           exculpatory statements that he had made up until 4  
2           o'clock in the morning were not going to get the job  
3           done because they had proof on videotape that things  
4           were otherwise. And in that case also the court found  
5           that the defendant's will had been overborne by  
6           improper psychological pressure in contravention of his  
7           Fifth Amendment rights against self-incrimination. The  
8           statement was not voluntarily given.

9           Also, similar to our case, in the Zimmer case  
10          the Zimmer defendant was told two or three times that  
11          she was lying. In our case I think it is very clear  
12          from the record that the defendant was told in words or  
13          substance many times over several hours, "We don't  
14          believe you. You got to come clean. You got to take  
15          some of the weight," et cetera. And I would ask the  
16          Court to consider that case in reaching its decision as  
17          to the voluntariness issue.

18           Additionally, on the issue of  
19          voluntariness -- and this is an issue I didn't raise  
20          specifically, but overnight it occurred to me -- I  
21          believe that another basis that the Court should use to  
22          suppress the statements in this case, especially the  
23          statements taken by Detective McHugh and Detective  
24          Partee after 4:00 in the morning, is the fact that my  
25          client was Mirandized -- I don't have the time right in

1 front of me, but I believe it's around 10 o'clock in  
2 the evening on December 9. He then proceeds to give  
3 exculpatory statement after exculpatory statement until  
4 approximately 4 o'clock in the morning when Detective  
5 Partee enters the picture and gives this rant about  
6 having to take some of the weight and appealing to his  
7 ethnic and racial connection that my client finally,  
8 his will being overborne, "Okay, here it goes. I did  
9 it," according to Detective Partee.

10 Detective Trillo gets Detective McHugh.  
11 Detective McHugh comes over and takes over the  
12 questioning with Detective Partee still present and  
13 fails to read him his Miranda rights again. And I  
14 believe under the circumstances in this case, six hours  
15 after the first reading of Miranda rights, given the  
16 conduct and actions and statements made by Detective  
17 Partee, that the Miranda case mandates that Detective  
18 McHugh not merely, as he testified, tell the defendant,  
19 "You understand that Detective Brosnan had Mirandized  
20 you," some six hours later when things were -- the  
21 state of events was much different.

22 The case that I had provided to your Honor,  
23 People versus Johnson, Kings County case from 1995, 168  
24 Misc2d 81, is a case I believe is instructive, which  
25 stands for the proposition that merely advising a

1 suspect that he had previously waived his rights can,  
2 in fact, suggest to the defendant that having once  
3 waived his rights he could not decline to do so again,  
4 and that's at 90. So I think that's another basis  
5 which your Honor should -- another basis your Honor  
6 should consider and find that my client's statements  
7 were involuntarily made and should be suppressed.

8 As to the other issue which we discussed  
9 yesterday as to what is the scope of the probable cause  
10 that runs from the misdemeanor warrants in this case in  
11 connection with the homicide detention, arrest,  
12 questioning, what have you, I have provided your Honor  
13 with People versus Way, a Nassau County case, 65 Misc2d  
14 865 which quotes the United States Supreme Court  
15 decision in Beyers versus United States which held that  
16 the court must be vigilant to scrutinize the attendant  
17 facts with an eye to detect and a hand to prevent  
18 violations of the Constitution by circuitous and  
19 indirect methods. And, your Honor, I submit to you  
20 that's exactly what we have here. The police did  
21 indirectly through the back door by circuitry, however  
22 you want to phrase it, what they could not have done  
23 without these misdemeanor warrants, which I want the  
24 record -- which are in evidence.

25 But I just want your Honor to be aware before

1 you make your decision these two warrants for my  
2 client, Mr. Jeannot, one docket 2003NA011102, was  
3 issued on June 6, 2003, about a year and four months  
4 before this arrest for the homicide; and the other one  
5 docket number 2002NA0023894, another misdemeanor  
6 warrant which was issued August 16, 2004, some almost  
7 four months before the homicide arrest. I submit to  
8 your Honor that the police suggestion that they were  
9 arresting my client based on these warrants --  
10 technically while they had the warrants and they could  
11 make the arrest, their conduct both before and after  
12 the arrests is not at all consistent with returning a  
13 defendant who had an outstanding warrant back to court  
14 to be returned on those warrants, but they were used as  
15 a tool to obtain statements from my client to further  
16 their homicide investigation which they could not have  
17 done because here they did not have probable cause to  
18 connect my client to the homicide, and the record is  
19 crystal clear on that. The only thing in the record  
20 that they have to establish anything close to  
21 reasonable suspicion, which is all that is arguable, is  
22 that my client was present, perhaps, with Mr. Orlando  
23 at the scene. That's it.

24 So I'm going to ask your Honor to suppress my  
25 client's statements based on the Fourth Amendment

1 violations, the Fifth Amendment violations and based on  
2 the CPL 60.45 proscriptions and also to suppress the  
3 statements as fruits of the illegal arrest which were  
4 made without the requisite probable cause. And as to  
5 the other matters, I'll rely on the record. Thank you,  
6 your Honor.

7 THE COURT: Thank you, gentlemen.

8 MR. HAYDEN: May I just respond briefly,  
9 Judge?

10 THE COURT: Yes.

11 MR. HAYDEN: I'm sorry. First of all, it's  
12 the People's position that counsel is grossly  
13 misstating these cases. As far as Sunset Bay is  
14 concerned, it involved a case where promises were made  
15 to the defendant, promises that were likely to induce a  
16 false confession. He was told, "You're going to go  
17 home. You're not going to be charged with anything.  
18 You're going to go to the hospital where it's going to  
19 be really nice. Your girlfriend can come and visit  
20 you. You won't be there for very long." These were  
21 deceptive promises that the court determined were  
22 likely to induce a false confession. That's nothing  
23 like this case.

24 Counsel cites People versus Johnson and  
25 neglects to tell the Court that it involved a defendant

1 who was undergoing heroin withdrawal and that the  
2 interrogation took 23 hours. Counsel cites Zimmer and  
3 tells the Court that it's the equivalent, the lie  
4 detector is the equivalent to the surveillance tape,  
5 which is not at all so, and I would cite a case and  
6 present a case to the Court when it comes to the  
7 surveillance camera, People versus Dickson, 260 AD2d  
8 931, Third Department, 1999, which reads in part:  
9 Falsely telling him that his actions were memorialized  
10 on a video surveillance camera in the gas station, this  
11 deception was not so fundamentally unfair as to deny  
12 defendant due process or accompanied by a promise or  
13 threat likely to induce a false confession. Misleading  
14 a defendant into believing that he or she had been  
15 under surveillance during the course of an alleged  
16 crime is hardly the type of statement that would induce  
17 a false confession. I would just like to submit this  
18 to the Court.

19 Counsel said that police had been  
20 interrogating and browbeating Mr. Jeannot for several  
21 hours before he said what he said. That's not at all  
22 true. The conversation with Detective Brosnan as  
23 described by Detective Brosnan was a fairly mellow  
24 conversation. The defendant was courteous throughout.  
25 There was eye contact. Everything was on the up and

1 up, no problem at all. Defendant made his "I had  
2 nothing to do with it. We weren't even there. We made  
3 the payment and took off." The statement was  
4 memorialized and that was it. That ended at 3:10.

5 According to Detective Partee, he didn't  
6 enter the room until 50 minutes had passed at  
7 approximately 4 o'clock. Of the first part of their  
8 conversation, I would say the first 15, 20 minutes,  
9 based on the description, was a portion of the  
10 conversation during which Detective Partee tried to  
11 ingratiate himself with the defendant, tried to get to  
12 know the defendant a little bit, tried to win the  
13 defendant's confidence and develop a rapport with the  
14 defendant. It was only for the last 35 minutes or so  
15 they became intense.

16 And we also disagree with what the defense  
17 keeps reading: "You're going to have to take the  
18 weight." That wasn't at all the thrust of that  
19 conversation. The thrust of the conversation is you're  
20 going to have to tell us what happened, because he's in  
21 there telling us his story. He's putting it all on  
22 you. We got to hear from you. We want to know what  
23 you have to say. What happened? He is not telling him  
24 that he knows him to be the shooter. He's not telling  
25 him anything of the kind. He's telling us his version.

1           We have to know your version. You're going to let him  
2           get away with that, blaming the whole thing on you?  
3           Tell us what happened. That was the thrust of the  
4           conversation. It was very brief.

5           And all Detective McHugh did when it came to  
6           rights was reiterate the rights. He didn't tell him,  
7           "Hey, you've already been informed. Let's continue."  
8           He went through those rights before proceeding with  
9           writing down what the defendant was saying into a  
10           written statement. That would have taken place  
11           somewhere in the vicinity of 10 to 5:00. Now, that's a  
12           second rendition of the rights, the first rendition  
13           having taken place at about 10:00. That's it, Judge.  
14           Thank you.

15           THE COURT: Thank you, gentlemen. The Court  
16           having conducted a hearing on this matter and listening  
17           to testimony and taking argument by counsel finds and  
18           determines as follows: On the evening of Thursday,  
19           December 9, 2004, Police Officer Phil Brady of the BSO  
20           and Police Officer Steven Loschiavo also of the BSO  
21           had, previous to taking into custody these defendants,  
22           attended a briefing, inter alia, with the members of  
23           the Homicide Squad, during which the Homicide Squad had  
24           probable cause to seek the detention of both of these  
25           defendants for the crime of murder.



1 is laid for the admission of those items.

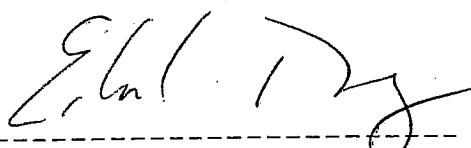
2 That constitutes the findings and decisions  
3 of this Court. A written decision will follow.

4 Gentlemen, at this time I have been asked by  
5 Judge Donnino to have you report to him for purposes of  
6 scheduling the trial date. I don't think it's  
7 necessary that your clients be present for that. It's  
8 simply a scheduling. Gentlemen, thank you.

9 \* \* \*

10 C E R T I F I C A T I O N

11  
12 I hereby certify the within to be a true and accurate  
13 transcription of my stenographic notes in the above  
14 proceeding.

15  
16   
17

18 Edward Dong  
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24  
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INDEX TO WITNESSESWitness

		<u>Page</u>
3	P.O. BRADY:	
4	Direct by Mr. Hayden	5
4	Cross by Mr. Hochheiser	11
5	Cross by Mr. Lemke	17
5	Redirect by Mr. Hayden	20
6	P.O. LOSCHIAVO:	
7	Direct by Mr. Hayden	21
7	Cross by Mr. Lemke	27
8	Cross by Mr. Hochheiser	36
8	Redirect by Mr. Hayden	37
9	Recross by Mr. Lemke	38
10	DET. McHUGH:	
11	Direct by Mr. Hayden	38
11	Cross by Mr. Hochheiser	81
11	Cross by Mr. Lemke	112
12	DET. BROSNAN:	
13	Direct by Mr. Hayden	141
13	Cross by Mr. Hochheiser	153
14	Cross by Mr. Lemke	169
15	DET. McGINN:	
16	Direct by Mr. Hayden	175
16	Cross by Mr. Lemke	200
16	Cross by Mr. Hochheiser	220
17	DET. LORE:	
18	Direct by Mr. Hayden	225
18	Cross by Mr. Lemke	229
19	Cross by Mr. Hochheiser	232
19	Redirect by Mr. Hayden	237
20	DET. PARTEE:	
21	Direct by Mr. Hayden	238
21	Cross by Mr. Hochheiser	248
22	Cross by Mr. Lemke	268
22	Redirect by Mr. Hayden	270
23	Recross by Mr. Hochheiser	270
24	DET. CEREGHINO:	
25	Direct by Mr. Hayden	271
25	Cross by Mr. Lemke	285
25	Cross by Mr. Hochheiser	304

1 INDEX TO WITNESSES

2 DET. HOCTOR:  
3 Direct by Mr. Hayden 307  
3 Cross by Mr. Lemke 313  
3 Cross by Mr. Hochheiser 314  
4  
5 DET. NASH:  
5 Direct by Mr. Hayden 318  
6 Cross by Mr. Lemke 325  
6 Cross by Mr. Hochheiser 330

7 EXHIBITS

8  
9 People's  
10 Exhibits Description ID EV  
11 1 Statement of Tommy Flores 45 46  
11 2A-D Warrants 51 52  
12 3 Rights' card 59 60  
12 4A-D Notes of Defendant Orlando 66 67  
13 5 Statement of Defendant Orlando 68 69  
13 6 Statement of Defendant Jeannot 77 78  
14 7 Video refusal form 79 80  
14 8 Rights' card 145 146  
14 9 Statement of Defendant Jeannot 151 152  
15 10 Notes of Det. McGinn 191  
15 11 Video refusal form 198 198  
16 12 Rights' card 274 275  
16 13 Statement of Defendant Orlando 278 278  
17 14 Diagram 279 280  
17 15 Consent search form 284 285  
18 16 Consent search form 309 310  
18 17 Consent search form 311 311  
19 18 Consent search form 312 313  
19 19 Notes of Det. Nash 321

20  
21 Defendant's  
22 Exhibits Description ID EV  
23 A Notes of Det. Partee 252  
23 B Notes of Det. Cereghino 286